

Senate Bill No. 1384

CHAPTER 847

An act to amend Sections 1337.9 and 1338.5 of the Health and Safety Code, relating to health facilities.

[Approved by Governor September 29, 2014. Filed with
Secretary of State September 29, 2014.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1384, Mitchell. Certified nurse assistants.

Existing law provides for the certification of nurse assistants by the State Department of Public Health. Existing law authorizes the department to deny an application for, initiate an action to suspend or revoke a certificate for, or deny a training and examination application for a nurse assistant under specified circumstances. Existing law requires, with some exceptions, the department to deny a training and examination application and deny, suspend, or revoke a certificate if the applicant or certificate holder has been convicted of a violation of or attempted violation of one or more specified crimes.

This bill would delete the requirement that the department deny a training and examination application and deny, suspend, or revoke a certificate if the applicant or certificate holder has been convicted of a violation or attempted violation of one or more of the specified crimes. The bill would make findings and declarations related to these provisions, and would make other related and conforming changes.

The people of the State of California do enact as follows:

SECTION 1. Section 1337.9 of the Health and Safety Code is amended to read:

1337.9. (a) The Legislature finds and declares all of the following:

(1) Recidivism is reduced when criminal offenders are given the opportunity to secure employment and engage in a trade, occupation, or profession.

(2) It is in the interest of public safety to assist in the rehabilitation of criminal offenders by removing impediments and restrictions upon the offenders' ability to obtain employment or engage in a trade, occupation, or profession based solely upon the existence of a criminal record.

(3) It is the intent of the Legislature that the state department, in determining eligibility under this section, have discretion to consider a conviction, but that the conviction not operate as an automatic bar to certification.

(b) The state department may deny an application for, initiate an action to suspend or revoke a certificate for, or deny a training and examination application for, a nurse assistant for any of the following:

(1) Unprofessional conduct, including, but not limited to, incompetence, gross negligence, unless due to circumstances beyond the nurse assistant's control, physical, mental, or verbal abuse of patients, or misappropriation of property of patients or others.

(2) Conviction of a crime substantially related to the qualifications, functions, and duties of a certified nurse assistant if the state department determines that the applicant or certificate holder has not adequately demonstrated that he or she has been rehabilitated and will present a threat to the health, safety, or welfare of patients.

(3) Conviction for, or use of, any controlled substance as defined in Division 10 (commencing with Section 11000), or any dangerous drug, as defined in Section 4022 of the Business and Professions Code, or alcoholic beverages, to an extent or in a manner dangerous or injurious to the certified nurse assistant, any other person, or the public, to the extent that this use would impair the ability to conduct, with safety to the public, the practice authorized by a certificate.

(4) Procuring a certified nurse assistant certificate by fraud or misrepresentation or mistake.

(5) Making or giving any false statement or information in conjunction with the application for issuance of a nurse assistant certificate or training and examination application.

(6) Impersonating any applicant, or acting as proxy for an applicant, in any examination required under this article for the issuance of a certificate.

(7) Impersonating another certified nurse assistant, a licensed vocational nurse, or a registered nurse, or permitting or allowing another person to use a certificate for the purpose of providing nursing services.

(8) Violating or attempting to violate, directly or indirectly, or assisting in or abetting the violating of, or conspiring to violate any provision or term of, this article.

(c) In determining whether or not to deny the application for licensure or renewal pursuant to paragraph (2) of subdivision (b), the department shall take into consideration the following factors as evidence of good character and rehabilitation:

(1) The nature and seriousness of the conduct or crime under consideration and its relationship to their employment duties and responsibilities.

(2) Activities since conviction, including employment or participation in therapy or education, that would indicate changed behavior.

(3) The period of time that has elapsed since the commission of the conduct or offense referred to in paragraph (1) or (2) and the number of offenses.

(4) The extent to which the person has complied with any terms of parole, probation, restitution, or any other sanction lawfully imposed against the person.

(5) Any rehabilitation evidence, including character references, submitted by the person.

(6) Employment history and current employer recommendations.

(7) Circumstances surrounding the commission of the offense that would demonstrate the unlikelihood of repetition.

(8) An order from a superior court pursuant to Section 1203.4, 1203.4a, or 1203.41 of the Penal Code.

(9) The granting by the Governor of a full and unconditional pardon.

(10) A certificate of rehabilitation from a superior court.

(d) When the state department determines that a certificate shall be suspended, the state department shall specify the period of actual suspension. The state department may stay the suspension and place the certificate holder on probation with specified conditions for a period not to exceed two years. If the state department determines that probation is the appropriate action, the certificate holder shall be notified that in lieu of the state department proceeding with a formal action to suspend the certification and in lieu of an appeal pursuant to subdivision (g), the certificate holder may request to enter into a diversion program agreement. A diversion program agreement shall specify terms and conditions related to matters, including, but not limited to, work performance, rehabilitation, training, counseling, progress reports, and treatment programs. If a certificate holder successfully completes a diversion program, no action shall be taken upon the allegations that were the basis for the diversion agreement. Upon failure of the certificate holder to comply with the terms and conditions of an agreement, the state department may proceed with a formal action to suspend or revoke the certification.

(e) A plea or verdict of guilty, or a conviction following a plea of nolo contendere shall be deemed a conviction within the meaning of this article. The state department may deny an application or deny, suspend, or revoke a certification based on a conviction as provided in this article when the judgment of conviction is entered or when an order granting probation is made suspending the imposition of sentence.

(f) Upon determination to deny an application or deny, revoke, or suspend a certificate, the state department shall notify the applicant or certificate holder in writing by certified mail of all of the following:

(1) The reasons for the determination.

(2) The applicant's or certificate holder's right to appeal the determination.

(g) (1) Upon written notification that the state department has determined that an application shall be denied or a certificate shall be denied, suspended, or revoked, the applicant or certificate holder may request an administrative hearing by submitting a written request to the state department within 20 business days of receipt of the written notification. Upon receipt of a written request, the state department shall hold an administrative hearing pursuant to the procedures specified in Section 100171, except where those procedures are inconsistent with this section.

(2) A hearing under this section shall be conducted within 60 days of the receipt of the written request of the applicant or certificate holder submitted pursuant to paragraph (1) by a hearing officer or administrative law judge designated by the director at a location, other than the work facility, convenient to the applicant or certificate holder unless the applicant or certificate holder agrees to an extension. The hearing shall be tape recorded and a written decision shall be sent by certified mail to the applicant or certificate holder within 30 calendar days of the hearing. Except as specified in subdivision (h), the effective date of an action to revoke or suspend a certificate shall be specified in the written decision, or if no administrative hearing is timely requested, the effective date shall be 21 business days from written notification of the department's determination to revoke or suspend.

(h) The state department may revoke or suspend a certificate prior to any hearing when immediate action is necessary in the judgment of the director to protect the public welfare. Notice of this action, including a statement of the necessity of immediate action to protect the public welfare, shall be sent in accordance with subdivision (d). If the certificate holder requests an administrative hearing pursuant to subdivision (g), the state department shall hold the administrative hearing as soon as possible but not later than 30 calendar days from receipt of the request for a hearing. A written hearing decision upholding or setting aside the action shall be sent by certified mail to the certificate holder within 30 calendar days of the hearing.

(i) Upon the expiration of the term of suspension, he or she shall be reinstated by the state department and shall be entitled to resume practice unless it is established to the satisfaction of the state department that the person has practiced as a certified nurse assistant in this state during the term of suspension. In this event, the state department shall revoke the person's certificate.

(j) Upon a determination to deny an application or deny, revoke, or suspend a certificate, the state department shall notify the employer of the applicant and certificate holder in writing of that determination, and whether the determination is final, or whether a hearing is pending relating to this determination. If a licensee or facility is required to deny employment or terminate employment of the employee based upon notice from the state that the employee is determined to be unsuitable for employment under this section, the licensee or facility shall not incur criminal, civil, unemployment insurance, workers' compensation, or administrative liability as a result of that denial or termination.

SEC. 2. Section 1338.5 of the Health and Safety Code is amended to read:

1338.5. (a) (1) (A) A criminal record clearance shall be conducted for all nurse assistants by the submission of fingerprint images and related information to the state department for processing at the Department of Justice. The licensing and certification program shall issue an All Facilities Letter (AFL) to facility licensees when both of the following criteria are met:

(i) The program receives, within three business days, 95 percent of its total responses indicating no evidence of recorded criminal information from the Department of Justice.

(ii) The program processes 95 percent of its total responses requiring disqualification in accordance with subparagraph (C) of paragraph (2) of subdivision (a) of Section 1337.9, as that section read on January 1, 2014, no later than 45 days after the date that the report is received from the Department of Justice.

(B) After the AFL is issued, licensees shall not allow nurse assistant trainees or newly hired nurse assistants to have direct contact with clients or residents of the facility prior to completion of the criminal record clearance. A criminal record clearance shall be complete when the department has obtained the person's criminal offender record information search response information from the Department of Justice and has determined that the person is not disqualified from engaging in the activity for which clearance is required. Notwithstanding any other provision of law, the department may, without taking regulatory action pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, implement, interpret, or make specific this paragraph by means of an AFL or similar instruction. The fee to cover the processing costs of the Department of Justice, not including the costs associated with capturing or transmitting the fingerprint images and related information, shall not exceed thirty-two dollars (\$32) per submission.

(C) An applicant or certificate holder who may be disqualified on the basis of a criminal conviction shall provide the department with a certified copy of the judgment of each conviction. In addition, the individual may, during a period of two years after the department receives the criminal record report, provide the department with evidence of good character and rehabilitation in accordance with subdivision (c) of Section 1337.9. Upon receipt of a new application for certification of the individual, the department may receive and consider the evidence during the two-year period without requiring additional fingerprint imaging to clear the individual.

(D) The department's Licensing and Certification Program shall explore and implement methods for maximizing its efficiency in processing criminal record clearances within the requirements of law, including a streamlined clearance process for persons who have been disqualified on the basis of criminal convictions.

(2) (A) Upon enrollment in a training program for nurse assistant certification, and prior to direct contact with residents, a candidate for training shall submit a training and examination application and the fingerprint cards to the state department to receive a criminal record review through the Department of Justice. Submission of the fingerprints to the Federal Bureau of Investigation shall be at the discretion of the state department.

(B) An applicant and any other person specified in this subdivision, as part of the background clearance process, shall provide information as to whether or not the person has any prior criminal convictions, has had any

arrests within the past 12-month period, or has any active arrests, and shall certify that, to the best of his or her knowledge, the information provided is true. This requirement is not intended to duplicate existing requirements for individuals who are required to submit fingerprint images as part of a criminal background clearance process. Every applicant shall provide information on any prior administrative action taken against him or her by any federal, state, or local government agency and shall certify that, to the best of his or her knowledge, the information provided is true. An applicant or other person required to provide information pursuant to this section that knowingly or willfully makes false statements, representations, or omissions may be subject to administrative action, including, but not limited to, denial of his or her application or exemption or revocation of any exemption previously granted.

(3) Each health facility that operates and is used as a clinical skills site for certification training, and each health facility, prior to hiring a nurse assistant applicant certified in another state or country, shall arrange for and pay the cost of the fingerprint live scan service and the Department of Justice processing costs for each applicant. Health facilities may not pass these costs through to nurse assistant applicants unless allowed by federal law enacted subsequent to the effective date of this paragraph.

(b) The use of fingerprint live scan technology implemented by the Department of Justice by the year 1999 shall be used by the Department of Justice to generate timely and accurate positive fingerprint identification prior to nurse assistant certification and prior to direct contact with residents by the nurse assistant applicant. The department shall explore options to work with private and governmental agencies to ensure that licensees have adequate access to electronic transmission sites, including requiring the department to maintain a contract for electronic transmission services in each of the district offices where facilities have indicated problems with timely access to electronic transmission sites or consistent delays of more than three business days in obtaining appointments for electronic transmission services through a private entity, government agency, or law enforcement agency.

(c) The state department shall develop procedures to ensure that any licensee, direct care staff, or certificate holder for whom a criminal record has been obtained pursuant to this section or Section 1265.5 or 1736 shall not be required to obtain multiple criminal record clearances.

(d) If the department is experiencing a delay in processing the renewal of the certified nursing assistant's certification at the time of the expiration of the certified nursing assistant's certification, the department may extend the expiration of the certified nursing assistant's certification for six months.

(e) If, at any time, the department determines that it does not meet the standards specified in clauses (i) and (ii) of subparagraph (A) of paragraph (1) of subdivision (a), for a period of 90 consecutive days, the requirements in paragraph (1) of subdivision (a) shall be inoperative until the department can demonstrate it has met those standards for a period of 90 consecutive days.

(f) During any time in which the requirements of paragraph (1) of subdivision (a) are inoperative, facilities may allow newly hired nurse assistants to have direct contact with clients or residents of the facility after those persons have submitted live scan fingerprint images to the Department of Justice, and the department shall issue an AFL advising facilities of this change in the statutory requirements.

(g) Notwithstanding any other law, the department is authorized to provide an individual with a copy of his or her state or federal level criminal offender record information search response as provided to that department by the Department of Justice if the department has denied a criminal background clearance based on this information and the individual makes a written request to the department for a copy specifying an address to which it is to be sent. The state or federal level criminal offender record information search response shall not be modified or altered from its form or content as provided by the Department of Justice and shall be provided to the address specified by the individual in their written request. The department shall retain a copy of the individual's written request and the response and date provided.